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IN THE

Supreme Court of the United States

ANTONIO DWAYNE HALBERT,

Petitioner,

v.

MICHIGAN,

Respondent.

ON WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

BRIEF OF THE STATES OF LOUISIANA, ALABAMA, COLORADO, HAWAI'I, INDIANA, MARYLAND, MISSISSIPPI, MONTANA, NEVADA, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH AND WASHINGTON AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

CHARLES C. FOTI
ATTORNEY GENERAL
JULIE E. CULLEN
DIRECTOR, CRIMINAL DIVISION
MIMI HUNLEY
ASS'T ATTORNEY GENERAL
LOUISIANA DEP'T OF JUSTICE
P.O. Box 94005
Baton Rouge, Louisiana
225-326-6200

GENE C. SCHAERR*
LINDA T. COBERLY
CHARLES B. KLEIN
PATRICK A. TILLOU
WINSTON & STRAWN LLP
1700 K Street, N.W
Washington, D.C. 20006
(202) 282-5000

Counsel for Amici Curiae

March 24, 2005

* Counsel of Record

[Additional counsel listed on inside cover]

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TROY KING
ATTORNEY GENERAL
STATE OF ALABAMA
Alabama State House
11 South Union Street,
Third Floor
Montgomery, AL 36130
(334) 242-7300

MARK J. BENNETT
ATTORNEY GENERAL OF
HAWAII
425 Queen Street
Honolulu, HI 96813
(808) 586-1500

J. JOSEPH CURRAN, JR.
ATTORNEY GENERAL OF
MARYLAND
200 St. Paul Place
Baltimore, MD 21202
(410) 576-6300

MIKE MCGRATH
ATTORNEY GENERAL
STATE OF MONTANA
Justice Building
P. O. Box 201401
Helena, MT 59620-1401
(406) 444-2026

JOHN W. SUTHERS
ATTORNEY GENERAL
STATE OF COLORADO
15125 Sherman Street
7th Floor
Denver, CO 80203
303-866-3557

STEVE CARTER
INDIANA ATTORNEY GENERAL
302 W. Washington Street
Indiana Government Center
South - 5th Floor
Indianapolis, IN 46204
(317) 232-6201

JIM HOOD
ATTORNEY GENERAL
STATE OF MISSISSIPPI
P.O. Box 220
Jackson, MS 39205
(601) 359-3680

BRIAN SANDOVAL,
ATTORNEY GENERAL
OFFICE OF THE ATTORNEY
GENERAL
NEVADA DEPARTMENT OF
JUSTICE
100 North Carson Street
Carson City, NV 89701
(775) 684-1112

BEST AVAILABLE COPY

JIM PETRO
ATTORNEY GENERAL OF
OHIO
State Office Tower
30 E. Broad Street 17th Floor
Columbus, OH 43215-3428
(614) 466-4320

W.A. DREW EDMONDSON
ATTORNEY GENERAL OF
OKLAHOMA
2300 N. Lincoln Boulevard,
Suite 112
Oklahoma City, OK 73105-
4894
(405) 521-3921

HENRY D. MCMASTER
ATTORNEY GENERAL OF SOUTH
CAROLINA
P. O. Box 11549
Columbia, SC 29211
(803) 734-3970

LAWRENCE E. LONG
ATTORNEY GENERAL
STATE OF SOUTH DAKOTA
500 East Capitol Avenue
Pierre, SD 57501-5070
(605) 773-3215

PAUL G. SUMMERS
ATTORNEY GENERAL OF
TENNESSEE
P.O. Box 20207
Nashville, TN 37202-0207
(615) 741-3491

GREG ABBOTT
ATTORNEY GENERAL OF
TEXAS
P.O. Box 12548
Austin, TX 78711
(512) 936-1700

MARK L. SHURTLEFF
UTAH ATTORNEY GENERAL
OF UTAH
Utah State Capitol Complex
East Office Bldg., Suite 320
Salt Lake City, UT 84114-2320
(801) 538-9600

ROB MCKENNA
ATTORNEY GENERAL OF
WASHINGTON
1125 Washington Street SE
P. O. Box 40100
Olympia, WA 98504-0100
(360) 753-6245

QUESTIONS PRESENTED

1. Does the Equal Protection Clause of the Fourteenth Amendment impose on the States the burden to appoint appellate counsel for an indigent criminal defendant who has no right to an appeal on the merits but who nonetheless applies for discretionary leave to appeal the conviction and/or sentence in an intermediate state appellate court?

2. Assuming petitioner has such a right, do the States have discretion to require that a defendant waive it as a condition of being allowed to enter a guilty plea rather than facing trial?

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INTERESTS OF AMICI CURIAE

Petitioner's arguments represent a fundamental challenge to the ability of all States to organize and manage their criminal justice systems as their citizens think best. Here, in reaction to the escalating costs imposed by the state's system of state-paid counsel, the Michigan legislature passed a statute denying state-paid counsel when a criminal defendant has pleaded guilty but wishes to seek a discretionary appeal of his sentence. The state's statute, moreover, requires that a criminal defendant waive the right to state-paid counsel as a condition of the guilty plea. Petitioner argues that this statutory scheme is unconstitutional because, according to petitioner, the equal protection component of the Fourteenth Amendment creates an *unwaivable* right to state-paid counsel for discretionary appeals brought by indigent defendants. Adoption of petitioner's argument thus poses a threat to a fundamental aspect of state sovereignty – a state's ability to manage the costs of its criminal justice system – even as it would create substantial practical problems for Michigan and other States that require criminal defendants to waive various rights as a condition of pleading guilty.

Although none of the *amici* States has adopted a statutory scheme identical to that at issue here, these States have an interest in the broad constitutional question of what measures they may take to further their strong interest in the finality of guilty pleas and in limiting the costs created by their criminal justice systems. *See United States* v. *Timmreck*, 441 U.S. 780, 784 (1979). *Amici* States believe that Michigan properly exercised its discretion to abolish the right to mandatory appeals from plea-based convictions and to limit the expenditure of public funds to finance applications for leave to appeal, and that the Michigan courts properly upheld Michigan's exercise of that discretion.

A reversal on the broad grounds urged by petitioner would adversely impact the interests of all the States. It would create new constitutional restrictions on the States' discretion to decide whether to appoint counsel for indigents in discretionary appeals. It would erode the settled principle that a criminal defendant can waive constitutional rights so long as he does so with "eyes open." *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 279 (1942). And it would no doubt significantly increase the number of applications for leave to appeal filed by indigents and, therefore, impose additional financial burdens on Michigan and other States.

Ironically, moreover, these financial burdens would give the States a strong incentive to eliminate *any* discretionary access to appellate courts by those entering guilty pleas – an option that is clearly authorized under this Court's decision in *McKane* v. *Durston*, 153 U.S. 684, 687 (1894). Thus, indigent criminal defendants across the Nation would likely fare worse, not better, if petitioner's arguments were adopted by this Court.

SUMMARY OF ARGUMENT

At the heart of this case is the States' "'wide discretion' to select appropriate solutions" to the difficulties they encounter in the administration of their criminal justice systems. *Murray* v. *Giarratano*, 492 U.S. 1, 14 (1989) (Kennedy, J., concurring) (citation omitted). Here, Michigan has exercised its discretion to afford each defendant an absolute right to appeal from a conviction after trial. Mich. Const. of 1963, art. I, § 20. Since, 1994, however, when Michigan voters amended the Michigan Constitution to provide that all appeals from plea-based felony convictions "shall be by leave of court," *id.*, any defendant who pleads guilty (or *nolo contendere*) to a felony in a Michigan court waives the right to an appeal on the merits, although the defendant may apply for a discretionary appeal. Accordingly, *all* defendants who

choose to plead guilty under Michigan law assume the risk that their convictions and sentences will never receive full substantive review by an appellate court.

With limited exceptions, moreover, Michigan has exercised its discretion not to appoint counsel to assist indigent defendants who seek leave to appeal from a plea-based felony conviction. Mich. Comp. Laws § 770.3a. Instead, as part of the guilty plea litany, a Michigan trial judge must inform each indigent defendant who intends to plead guilty that he or she "*waives* the right to have an attorney appointed at public expense to assist in filing an application for leave to appeal or to assist with other postconviction remedies." *Id.* § 770.3a(4) (emphasis added). The judge also must "determine whether the defendant understands the waiver." *Id.* Indigent defendants thus face a conscious choice when criminal charges are brought against them: (1) they can proceed to a trial on the merits and, if convicted, exercise a right to appeal on the merits as well as the right to state-paid counsel to assist with that appeal; or (2) they can plead guilty and avoid a trial on the condition that they waive their right to appeal and any right to state-paid counsel to assist in applying for discretionary leave to appeal.

This system does not violate the Fourteenth Amendment.

I. The States have broad discretion to fashion reasonable procedural rules governing the appointment of state-paid appellate counsel for indigents. The only decision of this Court limiting that discretion is *Douglas* v. *California*, 372 U.S. 353 (1963), which held that the Fourteenth Amendment requires the States to appoint counsel to indigents in appeals *as of right* that are decided on the merits. *Douglas* thus ensures that indigent appellants can meaningfully exercise an absolute right to an appeal when the States act in their discretion to afford such a right. In *Ross* v. *Moffit*, 417 U.S. 600 (1974), however, this Court refused to extend the holding in *Douglas* to *discretionary* appeals following an appeal as of right. Since *Ross*, this Court has confirmed "that the right to

appointed counsel extends to the first appeal as of right, *and no further*." *Pennsylvania* v. *Finley*, 481 U.S. 551, 555 (1987) (emphasis added).

As in *Ross* and *Finley*, the Court should deny this latest attempt to extend *Douglas* to a new context. First, such an extension is inconsistent with the principle that, although the Equal Protection Clause may sometimes require a state to *remove* a state-created bar or hurdle to the exercise of a right, the Fourteenth Amendment is not implicated simply because indigent citizens may be at a disadvantage compared to moneyed citizens in their ability to exercise that right to the fullest. *See, e.g.*, *Washington* v. *Davis*, 426 U.S. 229, 239-42 (1976). A disparate impact is insufficient to trigger equal protection analysis where, as here, the challenged governmental action is not a government-created hurdle but a failure to subsidize the exercise of government-created rights. *Cf., e.g.*, *M.L.B.* v. *S.L.J.*, 519 U.S. 102, 112-13 (1996); *id.* at 129 (Kennedy, J., concurring).

Second, even if the equal protection component of the Fourteenth Amendment were implicated by such a disparate impact, it would easily pass constitutional muster. Because indigency is not a suspect class, rational-basis scrutiny applies. And the state's interest in limiting the burden imposed on taxpayers by state-paid counsel certainly provides a rational basis for limiting their availability. This is a classic issue "of legislative choice based on difficult policy considerations and the allocation of scarce legal resources." *Murray*, 492 U.S. at 13 (O'Connor, J., concurring).

Third, an extension of *Douglas* to any discretionary appeals finds no basis in the text or history of the Fourteenth Amendment. That Amendment was enacted at a time when the practice of state-paid counsel was virtually unheard-of, and was clearly not considered a natural consequence of that Amendment's adoption.

II. Even assuming, for the sake of argument, that the Fourteenth Amendment affords indigent criminal defendants a right to state-paid counsel in first-tier discretionary appeals, petitioner's challenge to the Michigan statute is foreclosed by settled waiver principles. It is well-established that constitutional rights to counsel can be waived. It is equally accepted that the States can, and frequently do, require criminal defendants to waive constitutional rights as a condition of entering a guilty plea. Such waivers further legitimate state interests in promptly imposing punishment after plea-based convictions and in conserving public resources for cases in which defendants have chosen to exercise their constitutional rights and proceed to trial.

Petitioner nevertheless postulates that indigent defendants who plead guilty under Michigan law arguably are *less likely* to obtain discretionary leave to appeal than non-indigent defendants in similar circumstances. Even if this were true, however, this Court has confirmed that "absolute equality is not required," *Douglas*, 372 U.S. at 357. Instead, the constitutional inquiry is "one of degrees." *Ross*, 417 U.S. at 612. As in *Ross*, any inequality faced by indigents who decide to plead guilty, and thus waive their right to appeal and to state-paid appellate counsel, does not reach the level of "invidious discrimination." *Douglas*, 372 U.S. at 356. Petitioner cannot meet this stringent equal protection standard because, unlike in *Douglas*, neither indigent nor non-indigent criminal defendants who plead guilty under Michigan law have any guarantee of an appeal on the merits. And again, the State has a legitimate, rational basis for limiting funding for state-paid counsel. Accordingly, petitioners' equal protection attack on the Michigan waiver requirement is implausible and should be rejected.

STATEMENT OF FACTS

Amici adopt respondent's statement of facts.

ARGUMENT

All States have a strong interest in the finality of guilty pleas and in limiting the costs imposed on taxpayers by their criminal justice systems. Acting pursuant to these important interests, Michigan properly exercised its discretion to abolish the right to mandatory appeals from plea-based convictions and to limit the expenditure of public funds to finance applications for leave to appeal. That is because, as shown below in Section I, indigent criminal defendants have no right under the Fourteenth Amendment to state-paid counsel in first-tier discretionary appeals. Moreover, as shown in Section II, even if such a right existed, the States have discretion to require a waiver of that right as a condition of a guilty plea, and Michigan properly exercised that discretion in adopting the statutory waiver scheme at issue here.

I. Indigent Criminal Defendants Have No Fourteenth Amendment Right To State-Paid Counsel In First-Tier Discretionary Appeals.

Indigent criminal defendants have no Fourteenth Amendment right to state-paid counsel to assist in filing an application for a first-tier discretionary appeal. Contrary to petitioner's arguments, the limited right to counsel that this Court recognized in *Douglas* v. *California*, 372 U.S. 353 (1963), does not extend beyond direct appeals as of right. Moreover, extending *Douglas* to this new circumstance would be both unwise and unwarranted.

A. As This Court Has Held, The Limited Right To Appellate Counsel Established In Douglas Extends Only To Direct Appeals As Of Right, And "No Further."

This Court has addressed on several occasions the question whether the Fourteenth Amendment affords a right to state-paid counsel, but the Court has never found that any such right exists in connection with discretionary appeals.[1]

1. In *Douglas*, this Court addressed a situation in which the State of California had exercised its discretion to grant criminal defendants the right to a first-tier appeal on the merits. For indigent defendants, however, appellate counsel was appointed only if the appellate court first determined that such appointment would assist the defendant or the court itself – a decision that plainly implicated the merits of the appeal. In the decision at issue there, the appellate court had denied appellate counsel to the indigent petitioners, who had been tried and convicted by a jury, after concluding that "no good whatever could be served by appointment of counsel." *Id.* at 355 (citation omitted). The petitioners argued that this criminal procedure rule unconstitutionally discriminated against them, as indigents, because California granted non-indigents an unconditional right to appeal on the merits.

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[1] Petitioner argues that a first appeal allowed only "by leave of court," Mich. Const. of 1963, art. I, § 20, is not a discretionary appeal, Pet'r Br. 26 (asserting that "Petitioner's first-tier appeal to the Michigan Court of Appeals was not 'discretionary' in any sense"). This argument has no merit. Michigan law does not regulate when leave to appeal should or must be granted and, therefore, this decision by the Michigan Court of Appeals is, by definition, "discretionary." As this Court put it in *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954), "if the word 'discretion' means anything in a statutory or administrative grant of power, it means that the recipient must exercise his authority according to his own understanding and conscience." *Id.* at 266-267

The Court in *Douglas* acknowledged the States' discretion to regulate the appointment of counsel on appeal: "[A] State can, consistently with the Fourteenth Amendment, provide for differences [as to appointment of counsel on appeal] so long as the result does not amount to a denial of due process or an 'invidious discrimination.' Absolute equality is not required; lines can be and are drawn and we often sustain them." *Id.* at 356-57 (citations omitted). The Court nonetheless found that California had gone too far. Because of the need for a preliminary examination of the merits of an indigent's appeal, the Court held that "the *type of an appeal* a person is afforded in the District Court of Appeal hinges upon whether or not he can pay for the assistance of counsel." *Id.* at 355-56 (emphasis added). According to *Douglas*, an appellate court cannot "prejudge the merits" of an indigent's appeal while, at the same time, allowing appellants who can afford their own counsel to proceed directly to an appeal on the merits. *Id.* at 356.

The limited holding in *Douglas* requires the appointment of state-paid counsel only when an indigent exercises a criminal appeal that is not only on "the merits," but also "as of right":

> [W]here the merits of the one and only appeal an indigent has *as of right* are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor . . . . There is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals *as of right*, enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself.

Id. at 357 (emphases added). *Douglas* thus ensures that indigents and non-indigents alike have a right to counsel when – but only when – a State exercises its discretion to

guarantee an absolute right to appeal on the merits. *Id.* at 358.

2. Eleven years after *Douglas*, the Court in *Ross* v. *Moffit*, 417 U.S. 600 (1974), emphasized once again that the right created in *Douglas* was limited to appeals as of right. *Ross* held that the Fourteenth Amendment does not require the States to appoint counsel for indigent defendants in discretionary state appeals or in applications for United States Supreme Court review after an appeal of right was taken and decided on the merits. In so holding, this Court reaffirmed the "common theme" in its prior holdings "that a State is not obliged to provide any appeal at all for criminal defendants," *id.* at 606 (citing *McKane* v. *Durston*, 153 U.S. 684 (1894)), but that, when it does provide a non-discretionary right to appeal, the State "cannot arbitrarily cut off appeal rights for indigents while leaving open avenues of appeal for more affluent persons," *id.* at 607 (citing *Douglas*, 372 U.S. 353). The Court also clarified that "[t]he Fourteenth Amendment 'does not require absolute equality or precisely equal advantages,' . . . nor does it require the State to 'equalize economic conditions.'" *Id.* at 611-12 (citations omitted).

Applying these standards, the Court in *Ross* held that a State does not "arbitrarily cut off appeal rights for indigents" so long as its appellate system is "free of unreasoned distinctions" that result in a "meaningful appeal" for non-indigents but merely a "meaningless ritual" for indigents. *Id.* at 612 (citation omitted). The ultimate constitutional question, therefore, "is not one of absolutes, but one of degrees." *Id.* at 612.

In refusing to extend the holding in *Douglas* to discretionary appeals, the Court in *Ross* underscored the "legislative choice" afforded to the States to determine whether or not to make counsel available to convicted defendants in such appeals. As the Court put it, "[s]ome States which might well choose to do so as a matter of legislative policy may conceivably find that other claims for

public funds within or without the criminal justice system preclude the implementation of such a policy at the present time . . . . Our reading of the Fourteenth Amendment leaves these choices to the State." *Id.* at 618-19 (emphasis added).

3. Since *Ross*, the Court has consistently refused to extend *Douglas* to other contexts. In *Pennsylvania* v. *Finley*, 481 U.S. 551 (1987), for example, the Court considered whether an indigent has a constitutional right to counsel when collaterally attacking a conviction. The Court refused to extend *Douglas* to that situation given that there is not even a "federal constitutional right to counsel when pursuing a discretionary appeal on direct review." *Id.* at 555. As the Court put it, "[o]ur cases establish that the *right to appointed counsel extends to the first appeal of right, and no further.*" *Id.* (emphasis added). And the Court went on to reason that, "since a defendant has no federal constitutional right to counsel when pursuing a discretionary appeal on direct review of his conviction, *a fortiori*, he has no such right when attacking a conviction that has long since become final upon exhaustion of the appellate process." *Id.* (citations omitted); *see also Coleman* v. *Thompson*, 501 U.S. 722, 755 (1991) (construing *Douglas* as "establish[ing] that an indigent ... has a right to appointed counsel in his first appeal *as of right* in state court") (emphasis added); *Evitts* v. *Lucey*, 469 U.S. 387, 394 (1985) (holding that right to counsel under *Douglas* "is limited to the first appeal as of right")[2]; *Wainwright* v. *Torna*,

[2] Petitioner implies in his brief (at p. 21) that, in *Evitts*, the Court previously determined that there is a right to counsel on first-tier discretionary appeals. In that case, however, the Court was not faced with a discretionary appeal and never directly addressed the issue. On the facts before it, the Court found that the defendant was pursuing a direct appeal of right, and thus held that he was entitled to counsel under *Douglas* and to the effective assistance of such counsel under the due process clause. *Evitts*, 469 U.S. at 397, 401-402. The Court did not modify its holdings in *Douglas* or *Ross*, but instead reaffirmed that the "right to counsel is limited to the first appeal of right." *Id.* at 394.

455 U.S. 586, 587 (1982) (construing *Ross* as holding "that a criminal defendant does not have a constitutional right to counsel to pursue discretionary state appeals or applications for review in this Court").

The Court used the same reasoning in *Murray* v. *Giarratano*, 492 U.S. 1 (1989). There, the Court held that *Finley* applies equally to death penalty postconviction proceedings and, therefore, that it is up to the States to determine whether to appoint counsel to defendants in such circumstances. *Id.* at 10-11. Justice Kennedy confirmed the underlying principles of state sovereignty in his concurrence: "The requirement of meaningful access [to courts] can be satisfied in various ways. . . . The intricacies and range of options are of sufficient complexity that state legislatures and prison administrators must be given 'wide discretion' to select appropriate solutions." *Id.* at 14 (Kennedy, J., concurring) (citation omitted). And Justice O'Connor agreed in her separate concurrence that "the matter [of providing indigents state-paid counsel in postconviction proceedings] is one of legislative choice based on difficult policy considerations and the allocation of scarce legal resources." *Id.* at 13 (O'Connor, J., concurring).

4. The Court's steadfast refusal to extend *Douglas* explains why petitioner makes no meaningful effort to address his claim in the context of pertinent due process and equal protection frameworks, as *Amici* do below. Instead, in a classic example of the "domino method" of constitutional interpretation, he attempts to force-fit his situation into the limited *Douglas* holding. *Cf. Schneckloth* v. *Bustamonte* 412 U.S. 218, 246 (1973) ("We decline to follow what one judicial scholar has termed 'the domino method of constitutional adjudication . . . wherein every explanatory statement in a previous opinion is made the basis for extension to a wholly different situation.'") (citation omitted).

But this case simply does not fit the holding in *Douglas*. First, as we have explained, this Court has repeatedly

recognized that the holding there extends only "to the first appeal *of right*, and no further." *Finley*, 481 U.S. at 555. The proceeding at issue here certainly is a "first appeal," but it plainly is not an appeal "of right" given that the Michigan appellate courts have discretion to deny the appeal for any reason, or for no reason. *See supra* note 1.

Second, this case does not even fall within *Douglas'* reasoning, much less its direct holding. As we have previously explained, *Douglas* addressed the limited situation where the "*type of an appeal*" granted to a criminal defendant "hinge[d] upon whether or not [the appellant] can pay for the assistance of counsel." *Douglas*, 372 U.S. at 355-56 (emphasis added). In *Douglas*, non-indigents were *guaranteed* a right to a full appeal on the merits, whereas indigents' appeals were prejudged in the process of determining whether to give them counsel. Here, in contrast, the "type of appeal" from plea-based convictions under Michigan law is the same regardless whether the defendant is indigent or non-indigent – *i.e.*, *no* defendant has any guarantee of an appeal from a plea-based conviction.

The principal question in this case is thus whether *Douglas* should now be *extended*, for the first time, to create a new right to state-paid counsel to assist in applying for a first-tier discretionary appeal. It is to that question that we now turn.

B. The Limited Right Under *Douglas* To State-Paid Counsel In Appeals As Of Right Should Not Be Extended To First-Tier Discretionary Appeals.

As discussed above, no criminal defendant has a due process right to an appeal. *McKane*, 153 U.S. at 687. Of course, when the State exercises its discretion to afford an "appeal as of right," such an appeal must be "adjudicated in accord with due process[.]" *Evitts* v. *Lucey*, 469 U.S. 387, 396 (1985) (citation omitted). But this doctrine obviously

does not apply where, as here, a state exercises its constitutional discretion to *deny* an "appeal as of right" to a neutrally defined class of litigants (here, criminal defendants who plead guilty). *See id.* at 396 n.7.

Accordingly, the issue presented here should be governed by *Ross*, which held that when an indigent criminal defendant claims to have a Fourteenth Amendment right to state-paid appellate counsel in a discretionary appeal, that right must be based on equal protection principles: "Unfairness results only if indigents are singled out by the State and denied meaningful access to the appellate system because of their poverty. *That question is more profitably considered under an equal protection analysis.*" *Ross*, 417 U.S. at 611 (emphasis added); *see also id.* at 609 ("'Due process' emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated."); *accord Smith* v. *Robbins*, 528 U.S. 259, 293 n.1 (2000) (Souter, J., dissenting); *Lewis* v. *Casey*, 518 U.S. 343, 371-72 & n.3 (1996) (Thomas, J., concurring).

Here, extension of *Douglas* to a new type of appellate proceeding – a discretionary first-tier appeal – would be unwise and inappropriate for three distinct reasons: (1) it would be contrary to the principle that the Equal Protection Clause is not triggered merely by a failure to subsidize the exercise of a right, as opposed to the creation of a governmental hurdle; (2) it would be inconsistent with this Court's teachings that indigency is not a suspect class and, therefore, that equal-protection claims based on indigency must be reviewed under a rational-basis analysis; and (3) it would be contrary to the text and history of the Fourteenth Amendment.

1. Any Extension of *Douglas* Would Be Contrary To This Court's Clear Distinction, For Equal Protection Purposes, Between State-Created Hurdles To The Exercise Of Rights And A Mere Failure To Subsidize The Exercise Or Enjoyment Of Those Rights.

Any extension of the right to counsel recognized under *Douglas* founders on the principle, recognized in this Court's prior and subsequent decisions, that equal protection analysis is not triggered by a mere failure to subsidize the exercise or enjoyment of a right, as opposed to the erection of a state-created barrier to its exercise. The Court in *M.L.B.* v. *S.L.J.*, 519 U.S. 102, 110 (1996), addressed this dichotomy in equal protection jurisprudence when it discussed the "'age-old problem' of '[p]roviding equal justice for poor and rich, weak and powerful alike.'" *Id.* at 110 (quoting *Griffin* v. *Illinois*, 351 U.S. 12, 16 (1956)). The Court explained that its prior holdings that the States cannot "bolt the door to equal justice," *Griffin*, 351 U.S. at 24 (Frankfurter, J., concurring), by creating financial barriers to appeal must be distinguished from the "less encompassing" holding in *Douglas*:

> *In contrast to the "flat prohibition" of "bolted doors" that the* Griffin *line of cases securely established, the right to counsel at state expense, as delineated in our decisions, is less encompassing.* A State must provide trial counsel for an indigent defendant charged with a felony [under the Sixth Amendment], but that right does not extend to nonfelony trials if no term of imprisonment is actually imposed[.] A State's obligation to provide appellate counsel to poor defendants faced with incarceration applies to appeals of right. [Citing *Douglas*.] In *Ross* v. *Moffitt*, however, we held that neither the Due Process Clause nor the Equal Protection Clause requires a State to provide counsel at state expense to an indigent prisoner pursuing a discretionary

> appeal in the state system or petitioning for review in this Court.

M.L.B., at 112-13 (emphasis added) (citations omitted).[3] In his concurrence, Justice Kennedy succinctly summarized the Court's holding as follows: "[T]he State may not erect a bar in the form of transcript and filing costs beyond this petitioner's means." *Id.* at 129 (Kennedy, J., concurring).

That distinction – between a "bar" erected by the State and a mere failure to subsidize the exercise of a right under state law – is fatal to petitioner's argument. What petitioner seeks is not the removal of a state-created "bar" – *i.e.*, a financial hurdle to accessing the legal system. Instead, petitioner seeks state-paid assistance that he thinks will enable him to pursue his legal remedies as effectively as non-indigents who can afford to hire their own counsel. Thus, the Michigan law at issue here does not run afoul of the "'flat prohibition' of 'bolted doors' that the *Griffin* line of cases securely established," *M.L.B.*, 519 U.S. at 112-13. It simply limits the subsidy that the State offers to indigent defendants who choose to plead guilty.[4] With the possible exception of *Douglas*, this Court has routinely rejected similar efforts to require state-paid subsidies that go beyond the removal of hurdles the state itself has created. The rejection of such subsidies, moreover, follows from the Court's rejection of the

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[3] In *M.L.B.*, the Court held that the States may not condition appeals from trial court decrees terminating parental rights on the affected parent's ability to pay a record preparation fee. 519 U.S. at 128. *Griffin* held that the indigent petitioner was entitled to a free trial transcript to pursue his appeal. 351 U.S. at 20. Both of those requirements were obviously state-created hurdles to the exercise of litigation rights under state law.

[4] As explained at length in respondents' brief, moreover, Michigan has done its best to make it easy for criminal defendants to proceed without counsel. They have access to easy-to-follow forms. And they get free legal help to frame appellate issues in the context of seeking reconsideration at the trial court level.

disparate-impact theory of the Equal Protection Clause. *See Washington* v. *Davis*, 426 U.S. 229, 239 (1976). It is well-established that "a law or official act does not violate the Constitution "*solely* because it has a . . . disproportionate impact." *Id.* at 239; *see also, e.g., Lewis* v. *Casey*, 518 U.S. 343, 375-78 (1996) (Thomas, J., concurring) (citing cases); *Harris* v. *McRae*, 448 U.S. 297, 323 n.26 (1980) (holding that "it is incumbent upon the [equal protection] challenger to prove that Congress selected or reaffirmed a particular course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group") (citations omitted); *Mayer* v. *Roe*, 432 U.S. 464, 470-71 (1977); *cf. M.L.B.*, 519 U.S. at 135 ("The [Equal Protection] Clause is not a panacea for perceived social or economic inequity; it seeks to 'guarante[e] equal laws, not equal results.'") (Rehnquist, C.J., dissenting) (citation omitted). Consistent with this principle, this Court should reject petitioner's arguments and hold instead that government action that may have a disparate impact on the poor does not for that reason trigger equal protection analysis unless the government has erected an affirmative "bar" or "hurdle" to the exercise of a right.[5]

[5] In his dissent in *M.L.B.*, Justice Thomas, joined by Justice Scalia, stated that he "would be inclined to vote to overrule *Griffin* and its progeny," presumably including *Douglas*, and hold that a disparate impact on the poor cannot trigger an equal-protection violation at all. *M.L.B.*, 519 U.S. at 139 (Thomas, J., dissenting). This case does not require the Court to decide that issue or to overrule either *Griffin* or *Douglas*. Instead, consistent with *Ross*, *Finley* and *Murray*, the Court should simply refuse to extend *Douglas* to this new situation.

2. Any Extension of *Douglas* Would Be Contrary To This Court's Teaching That Indigency Is Not A Suspect Class And, Therefore, That Indigency-Based Claims Are Subject To Rational Basis Review.

Even assuming, for the sake of argument, that this case triggers an equal protection analysis, petitioner's arguments do not satisfy the pertinent equal protection standards. To prevail on such a claim, petitioner must show that the Michigan statute "operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict scrutiny." *San Antonio Indep. School Dist.* v. *Rodriguez*, 411 U.S. 1, 17 (1973). Yet this Court has repeatedly held that "wealth discrimination alone" does not provide "an adequate basis for invoking strict scrutiny[.]" *Id.* at 29; *Harris*, 448 U.S. at 323 ("this Court has held repeatedly that poverty, standing alone is not a suspect classification" for equal protection purposes). Consequently, Michigan's statute passes equal protection muster as long as "it rationally furthers some legitimate, articulated state purpose and therefore does not constitute an invidious discrimination." *Rodriguez*, 411 U.S. at 17.

1. Petitioner faces a heavy burden of proving an equal protection violation under this standard because "every claim arising under the Equal Protection Clause has implications for the relationship between national and state power under our federal system. . . . '[T]he maintenance of the principles of federalism is the foremost consideration in interpreting any of the pertinent constitutional provisions under which this Court examines state action.'" *Id.* at 44 (citations omitted). The Michigan statute is thus entitled to a "presumption of validity[.]" *Id.* at 55.

Under these settled standards, indigent defendants have no equal protection right to state-paid counsel in first-tier

discretionary appeals when state criminal procedure statutes, like the one at issue here, do not arbitrarily "single[] out" indigents by unfairly denying them a right to an appeal on the merits. *Id.* at 611. Even the Court in *Douglas* emphasized that the States may "provide for differences" in the circumstances under which appellate counsel will be appointed as long as the adopted procedures do not amount to "an 'invidious discrimination.'" 372 U.S. at 356 (citations omitted).

Here, Michigan has properly exercised its discretion to "provide for [such] differences." *Id.* In particular, Michigan appoints counsel for indigent criminal defendants who have an unqualified right to appeal, but it declines to appoint counsel to criminal defendants who have only a limited right to apply for first-tier discretionary appellate review. The pertinent constitutional question, therefore, is whether this "difference[]" in treatment results in "invidious discrimination" against indigents. *Id.* It does not.

There can be no "invidious discrimination" where, as here, a State exercises its discretion to impose on *all* criminal defendants who plead guilty – indigents as well as non-indigents – the initial hurdle of applying for discretionary leave of the appellate court to review the case on the merits. Unlike in *Douglas*, indigents and non-indigents who plead guilty in Michigan have no right to an appeal on the merits regardless of whether they are represented by counsel. Affluent defendants who plead guilty in Michigan may not receive leave to appeal despite the best efforts of their counsel. And the appointment of counsel to indigents in petitioner's situation certainly would not guarantee any appeal on the merits.

Michigan law thus does not "single[] out" indigent criminal defendants or otherwise deny them "meaningful access to the appellate system" – *i.e.*, an absolute *right* to an appeal on the merits – "because of their poverty." *Ross*, 417 U.S. at 611. Under these circumstances, any purported equal protection

concern is purely speculative and, therefore, must give way to "legislative choice" so long as that "choice" has a rational basis. *Ross*, 417 U.S. at 618; *see also Rodriguez*, 411 U.S. at 17.

2. The Michigan statute has a clear, rational basis and, therefore, is not invidiously discriminatory. *Rodriguez*, 411 U.S. at 17. It is undisputed that Michigan validly requires each defendant who pleads guilty to waive his or her right to appeal. *See, e.g.*, *McKane* v. *Durston*, 153 U.S. 684, 687 (1894). As the Michigan Supreme Court has said, this decision was deemed necessary to "reduce a crushing burden on [Michigan's] appellate courts":

> Before the ratification of Proposal B [the provision at issue] in 1994, Michigan was one of only a handful of states that provided an unconditional right of appeal for those who pleaded guilty. In 1994, the Legislature submitted Proposal B to the electorate to decide whether to make appeals from plea-based convictions discretionary. . . . By 1992, the Court of Appeals had a backlog of more than 4,000 cases awaiting decision, and "[p]lea-based appeals constitute[d] approximately thirty percent of all appeals facing the Michigan Court of Appeals." *Eliminating appeals of right from plea-based convictions was one method proposed to reduce a crushing burden on our appellate courts.*

People v. *Bulger*, 614 N.W.2d 103, 106-07 (Mich. 2000) (emphasis added) (citations and footnote omitted).

Michigan similarly acted with a rational basis – not "arbitrarily" in violation of the Fourteenth Amendment, *Ross*, 417 U.S. at 607 – when it limited the right to state-paid counsel in connection with applications for leave to appeal from plea-based convictions. Such legislation is consistent with a state's laudable goals: (1) to "more promptly impose[] punishment after an admission of guilty"; (2) to "more effectively attain the objectives of punishment"; and (3) to

conserve "scarce judicial and prosecutorial resources . . . for those cases in which there is a substantial issue of the defendant's guilt or in which there is substantial doubt that the State can sustain its burden of proof." *Brady* v. *United States*, 397 U.S. 742, 752 (1970). As the Court noted in *United States* v. *Timmreck*, 441 U.S. 780 (1979):

> Every inroad on the concept of finality undermines confidence in the integrity of our procedures; and, by increasing the volume of judicial work, inevitably delays and impairs the orderly administration of justice. The impact is greatest when new grounds for setting aside guilty pleas are approved because the vast majority of criminal convictions result from such pleas.

Id. at 784 (citation omitted).

Absent the limitations on state-paid counsel, indigents would have every incentive to apply for leave to appeal, regardless of whether the application had merit, because Michigan taxpayers would be footing the bill. Michigan – which, again, has no constitutional obligation to allow even a discretionary appeal from any conviction – thus acted rationally and in furtherance of a legitimate purpose when it passed a law providing appointed appellate counsel to indigents only in limited circumstances once they admit their crime by pleading guilty and waive their right to an appeal. *See Rodriguez*, 411 U.S. at 54-55 ("The constitutional standard under the Equal Protection Clause is whether the challenged state action rationally furthers a legitimate state purpose or interest.").

3. Petitioner's equal protection claim is based solely on conjecture that indigent defendants who have no right to appeal but who may apply for a discretionary appeal are *less likely* to obtain leave to appeal than non-indigent defendants in similar circumstances. This may be true, but it does not establish an equal protection violation as long as indigents and non-indigents alike are denied an absolute right to appeal.

As the Court put it in *Ross*, "[t]he duty of the State under our cases is not to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process." *Ross*, 417 U.S. at 616 (emphasis added); *accord Smith* v. *Robbins*, 528 U.S. 259, 277 n.9 (2000).[6]

That is what Michigan has done. Indeed, its statute is fully consistent with the holdings in *Ross* and other cases discussed above in which the Court found that disparate impact based on wealth was not "so irrational as to be invidiously discriminatory." *See, e.g., Rodriguez*, 411 U.S. at 54-55 (finding that reliance by Texas school-financing system on local property taxation did not violate Equal Protection Clause). Michigan acted with a rational basis and thus properly exercised its "legislative choice," *Ross*, 417 U.S. at 618, to require defendants who plead guilty to waive any right to state-paid counsel in connection with a first-tier discretionary appeal.

3. Any Further Extension of *Douglas* Would Be Contrary To The Language And History Of The Fourteenth Amendment.

Finally, neither the text nor the history of the Fourteenth Amendment supports any extension of *Douglas* to first-tier discretionary appeals.

As the Court is well aware, the only provision of the United States Constitution that expressly addresses a right to counsel

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[6] Any "access-to-appeal blockages" here are caused by an indigent's inability to afford competent counsel, not by a barrier created by the State. *Kowalski* v. *Tesmer*, 125 S. Ct. 564, 576 (2004) (Ginsburg, J., dissenting). There is thus no barrier to remove under the Equal Protection Clause. Again, that Clause does not require "the State to 'equalize economic conditions.'" *Ross*, 417 U.S. at 612 (citing *Griffin*, 351 U.S. at 23).

is the Sixth Amendment. U.S. Const. amend. VI; *Gideon* v. *Wainwright*, 372 U.S. 335, 343-345 (1963). That Amendment, however, does not apply to appellate proceedings at all. *Martinez* v. *Court of Appeals*, 528 U.S. 152, 160-161 (2000). And that, of course, is why petitioner does not assert that he has any right to state-paid appellate counsel under the Sixth Amendment.

Nor has petitioner has cited anything in the history or structure of the Fourteenth Amendment to suggest that the framers and ratifiers of that amendment could have contemplated that it would be used to create a due process or equal protection right to state-paid appellate counsel – particularly where the asserted basis for the right is indigency rather than race. *Cf. City of Boerne* v. *Flores*, 521 U.S. 507, 520-24 (1997) (discussing how Fourteenth Amendment focused on race discrimination); *Washington* v. *Davis*, 426 U.S. 229, 239 (1976). The absence of such history is hardly surprising because the framers and ratifiers of the Sixth Amendment – which, unlike the Fourteenth Amendment, specifically references a right to counsel – did not contemplate a right to any state-paid counsel, either. As this Court stated in *Scott* v. *Illinois*, 440 U.S. 367 (1979), "[t]here is considerable doubt that the Sixth Amendment itself, as originally drafted by the Framers of the Bill of Rights, contemplated any guarantee other than the right of an accused in a criminal prosecution in a federal court to employ a lawyer to assist in his defense." *Id.* at 370. There appears to be no serious dispute among legal scholars and historians that the Sixth Amendment, as enacted, provided nothing more than a right of an accused to the assistance of his or her own personally funded counsel and in no way mandated that counsel be provided by the government, be it federal or state.[7]

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[7] *See, e.g.*, Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 114 (1998) ("[T]he Sixth Amendment gave the accused some freedom, some autonomy, in controlling the shape of 'his defence' [including] . . . whom (if anyone) to hire as a lawyer."); Anthony Lewis, *Gideon's Trumpet* 110 (Vintage Books 1989) (1964) ("Historically speaking, the amendment was almost certainly not envisaged by its framers as reaching the problem of the man too poor to hire a lawyer for his defense.").

It was not until the 1932 decision in *Powell* v. *Alabama*, 287 U.S. 45 (1932) – decided 64 years after the Fourteenth Amendment was ratified in 1868 – that this Court first held that "the right to have counsel appointed [under the Sixth Amendment], when necessary, is a logical corollary from the constitutional right to be heard by counsel." *Id.* at 72. And it was not until the 1963 decision in *Gideon* – almost 100 years after the Fourteenth Amendment was ratified – that the Sixth and Fourteenth Amendments were deemed to provide indigent defendants a right to state-provided counsel in felony proceedings. 372 U.S. 335, 344-45 (1963).

Given this slow evolution of the Court's right-to-counsel jurisprudence, the framers and ratifiers of the Fourteenth Amendment could not have contemplated that it would be construed as creating a constitutional right to state-paid appellate counsel when the Amendment became effective in the mid-1800s.

This Court's early precedent holding that the States have broad discretion to deny criminal defendants the right to *any* appeal on the merits strongly supports this conclusion. In 1894, the Court held:

> An appeal from a judgment of conviction is not a matter of absolute right, independently of constitutional or statutory provisions allowing such appeal. *A review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common law, and is not now, a necessary element of due process of law.* It is wholly within the discretion of the state to allow or not to allow such a review.

McKane, at 687 (emphasis added). Such discretion is elementary to basic principles of state sovereignty – so much so that "[a] citation of authorities upon the point is unnecessary." *Id.* Petitioner's argument for a new, judicially-established Fourteenth Amendment right to state-paid counsel in connection with first-tier discretionary appeals cannot be squared with this history, and is certainly not compelled by the language or history of the Fourteenth Amendment.

II. Even If Indigent Defendants Have A Fourteenth Amendment Right To State-Paid Counsel In First-Tier Discretionary Appeals, The States Have The Discretion To Require Waiver Of That Right As A Condition Of A Guilty Plea.

Even if the Court decided to extend *Douglas* and hold that indigent criminal defendants have a Fourteenth Amendment right to state-paid counsel in first-tier discretionary appeals, petitioner still must establish that he did not waive this right when he opted to enter a guilty plea to avoid trial. As we show below, it is well-established that defendants can voluntarily waive their constitutional rights to counsel, and that the States may require defendants to waive constitutional rights as a condition of accepting a guilty plea. It logically follows that the States have the discretion to condition plea-based convictions on a waiver by the defendant of any Fourteenth Amendment right to state-paid counsel. Michigan properly exercised that discretion here.

A. The States Can Validly Require Waiver Of Constitutional Rights As A Condition Of A Guilty Plea.

1. There can be no serious doubt that constitutional rights can be waived by criminal defendants. For example, in *Johnson* v. *Zerbst*, 304 U.S. 458 (1938), this Court noted that a criminal defendant was free to waive his right to counsel so

long as he did so knowingly and intelligently so that it was "an intentional relinquishment or abandonment of a known right or privilege." *Id.* at 464; *see also Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 279 (1942) (defendant can waive his right to counsel so long as he does so "with eyes open").

Moreover, this Court has held that a criminal defendant may waive his right to counsel knowingly and intelligently even without complete knowledge of the potential consequences. In *United States* v. *Ruiz*, 536 U.S. 622 (2002), for example, this Court held that a prosecutor need not provide all potential impeachment information to a criminal defendant before he enters a guilty plea. *Id.* at 625. Although the prosecutor would have been forced to disclose this information had the case gone to trial, the failure to disclose it did not render the defendant's guilty plea unknowing. As the Court put it:

> [T]he law ordinarily considers a waiver knowing, intelligent and sufficiently aware if the defendant fully understands the nature of the right and how it would likely apply *in general* in the circumstances – even though the defendant may not know the *specific detailed* consequences of invoking it.

Id. at 629.

Similarly, in *Iowa* v. *Tovar*, 124 S. Ct. 1379 (2004), the Court faced the question of what warnings were required to make a waiver of counsel at the guilty plea stage knowing and intelligent. The Court rejected the notion, adopted by the court below, that the trial judge was required to warn defendants of the specific uses that an attorney could serve. *Id.* at 1389. The Court concluded instead that, on the facts of that case, the warnings given to the criminal defendant, including the trial court's provision of the ordinary guilty plea litany, were sufficient to inform the defendant of his right to counsel and provide him with sufficient information to

knowingly and intelligently waive his right to counsel. *Id.* at 1389-90.

2. This Court's decisions also establish that a government can require criminal defendants to waive their constitutional rights as a condition of pleading guilty. All criminal defendants have constitutional guarantees to trial by jury, against self-incrimination and to confront accusers. U.S. Const. amends. V, VI. Nevertheless, the States can, and frequently do, require defendants to waive these constitutional protections as a condition of accepting a guilty plea: "When a defendant pleads guilty he or she, of course, forgoes not only a fair trial, but also other accompanying constitutional guarantees." *Ruiz*, 536 U.S. at 628-29. Indeed, the vast majority of criminal defendants voluntarily choose to waive their constitutional rights in return for the "likelihood of securing leniency should a guilty plea be offered and accepted." *Brady*, 397 U.S. at 748-56 (recognizing that "well over three-fourths of the criminal convictions in this country rest on pleas of guilty") (citations omitted); *see also Timmreck*, 441 U.S. at 784 ("[T]he vast majority of criminal convictions result from [guilty] pleas").

Such waivers, moreover, are generally both knowing and intelligent, thus raising no constitutional concerns. *Brady*, 397 U.S. at 753 (Court could not find that a system in which the government offers the defendant an incentive to plead guilty somehow renders the waiver of the right to trial involuntary.). As this Court put it in *Tollett* v. *Henderson*, 411 U.S. 258 (1973), "a guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." *Id.* at 267.

Petitioner cites no decisions of this Court, and we are aware of none, limiting the States' discretion to condition guilty pleas on a waiver of constitutional rights, so long as the waiver is knowing and intelligent. Neither *Douglas* nor *Ross* sheds any light on this issue given that the defendants in these cases opted to exercise their constitutional rights and proceed to trial. Other holdings by this Court, however, clearly establish that "[t]he most basic rights of criminal defendants are . . . subject to waiver." *Peretz* v. *United States*, 501 US 923, 936 (1991); *see also United States* v. *Mezzanatto*, 513 U.S. 196, 201 (1995).

B. The Michigan Statute Validly Requires Waiver Of The Right To Counsel As A Condition Of A Guilty Plea.

While acknowledging that the Michigan statute requires a waiver of any right to counsel as a condition of a plea, petitioner nevertheless argues that this waiver requirement "itself violates the Fourteenth Amendment." Pet'r Br. 44. But petitioner is wrong.

1. Prior to petitioner's plea, Michigan provided him, along with all other criminal defendants, an *absolute* guarantee to an appeal on the merits and thus "an adequate [and absolute] opportunity to present his claims fairly in the context of the State's appellate process." *Ross*, 417 U.S. at 616. This guarantee included the right to appointed appellate counsel under *Douglas*.

Michigan merely required petitioner to waive this absolute right to appeal and the attendant right to appointed appellate counsel if he decided to plead guilty. *See* MCL 770.3a (requiring judge to "advise the defendant that, if a plea is accepted by the court, the defendant waives the right to have an attorney appointed at public expense to assist in filing an application for leave to appeal"). Petitioner, of course, was free to decline this opportunity.

2. According to petitioner, however, the Michigan statute, MCL 770.3a, runs afoul of *Douglas* because it requires indigents who opt to plead guilty to give up the assistance of state-paid counsel in connection with an application for leave to appeal, "while a moneyed defendant would not be required to give up *meaningful appellate review* of such sentencing errors." Pet'r Br. 44 (emphasis added). This argument distorts Michigan law, which provides no right to "meaningful appellate review of . . . sentencing errors" to *any* defendant who pleads guilty. Again, unlike in *Douglas*, no criminal defendant – regardless of financial status – has a right to appeal from a plea-based conviction. *See* Mich. Const. of 1963, art. I, § 20. As demonstrated above, this fact alone distinguishes *Douglas*.

Petitioner simply overlooks the fact that Michigan afforded him the constitutional right to appointed appellate counsel established under *Douglas*. To the extent petitioner was concerned about his right to an appeal on the merits and the assistance of counsel in that appeal, he had every opportunity to proceed to trial and preserve those rights. Criminal defendants like petitioner who opt to plead guilty cannot complain about the loss of constitutional rights that were surrendered voluntarily.[8]

The voluntary nature of petitioner's waiver, and the fact that affluent defendants have no more right to appeal than indigent defendants, forecloses his equal protection challenge to Michigan's waiver requirement. This Court confirmed in *Douglas* that "absolute equality is not required" in connection

[8] *Amici* take no position on whether, in this case, the actual circumstances of petitioner's plea conform to the requirements of the statute and therefore constitute a constitutionally valid waiver by the defendant. We defer to respondent's treatment of this issue. We note, however, that if the Court were to conclude that the waiver in this case was invalid, the proper remedy would be to vacate the decision below and allow the courts below an opportunity to determine in the first instance how best to respond to that invalidity.

with the States' discretion to appoint appellate counsel to indigents, 372 U.S. at 356-57, and that the key constitutional inquiry "is not one of absolutes, but one of degrees," *Ross*, 417 U.S. at 612.

Here, *all* criminal defendants (indigents and non-indigents alike) who decide to plead guilty under Michigan law make that decision with full disclosure and an understanding that their right to absolute appeal will be waived and, therefore, that their ability to succeed on appeal may be severely curtailed. Even assuming that the likelihood of success under these circumstances will be smaller for indigents than non-indigents, that purported inequality simply does not rise to a degree of "invidious discrimination," *Douglas*, 372 U.S. at 356, and thus does not create an equal protection violation.

Indeed, as discussed earlier (*supra* pp. 17-20), to sustain the waiver requirement against an equal protection challenge based on that requirement's alleged disparate impact on the indigent, all that Michigan must do is to establish that the requirement has a rational basis. As the Michigan Supreme Court held in *Bulger*, the waiver requirement (1) promotes finality in criminal judgments, and (2) conserves judicial and financial resources for other priorities. 614 N.W.2d at 106-07. Petitioner cannot meet his burden of establishing that the waiver requirement is not rationally related to these legitimate – indeed significant – governmental interests.

* * * * *

While some States may legitimately choose to provide state-paid counsel to indigents who pursue discretionary appeals, the States must be allowed to retain discretion under the Fourteenth Amendment to "find that other claims for public funds within or without the criminal justice system preclude the implementation of such a policy[.]" *Ross*, 417 U.S. at 618. Accordingly, this Court should adhere to its ruling in *Ross* that, absent a direct violation of *Douglas*, this is a "legislative choice" that is left to the States. Petitioner's

argument that the issue should be decided as a matter of federal constitutional law reflects a "'mother knows best' approach" that "should play no part in traditional constitutional adjudication." *Murray*, 492 U.S. at 11.

CONCLUSION

The judgment of the Michigan Court of Appeals denying petitioner's application for leave to appeal should be affirmed.

Respectfully submitted,

CHARLES C. FOTI
ATTORNEY GENERAL
JULIE E. CULLEN
DIRECTOR, CRIMINAL DIVISION
MIMI HUNLEY
ASS'T ATTORNEY GENERAL
LOUISIANA DEP'T OF JUSTICE
P.O. Box 94005
Baton Rouge, Louisiana
225-326-6200

GENE C. SCHAERR*
LINDA T. COBERLY
CHARLES B. KLEIN
PATRICK A. TILLOU
WINSTON & STRAWN LLP
1700 K Street, N.W
Washington, D.C. 20006
(202) 282-5000

TROY KING
ATTORNEY GENERAL
STATE OF ALABAMA
Alabama State House
11 South Union Street,
Third Floor
Montgomery, AL 36130
(334) 242-7300

JOHN W. SUTHERS
ATTORNEY GENERAL
STATE OF COLORADO
15125 Sherman Street
7th Floor
Denver, CO 80203
303-866-3557

MARK J. BENNETT
ATTORNEY GENERAL OF HAWAII
425 Queen Street
Honolulu, HI 96813
(808) 586-1500

STEVE CARTER
INDIANA ATTORNEY
GENERAL
302 W. Washington Street
Indiana Government Center
South - 5th Floor
Indianapolis, IN 46204
(317) 232-6201

J. JOSEPH CURRAN, JR.
ATTORNEY GENERAL OF
MARYLAND
200 St. Paul Place
Baltimore, MD 21202
(410) 576-6300

JIM HOOD
ATTORNEY GENERAL
STATE OF MISSISSIPPI
P.O. Box 220
Jackson, MS 39205
(601) 359-3680

MIKE MCGRATH
ATTORNEY GENERAL
STATE OF MONTANA
Justice Building
P. O. Box 201401
Helena, MT 59620-1401
(406) 444-2026

BRIAN SANDOVAL,
ATTORNEY GENERAL
OFFICE OF THE ATTORNEY
GENERAL
NEVADA DEPARTMENT OF
JUSTICE
100 North Carson Street
Carson City, NV 89701
(775) 684-1112

JIM PETRO
ATTORNEY GENERAL OF
OHIO
State Office Tower
30 E. Broad Street 17th Floor
Columbus, OH 43215-3428
(614) 466-4320

W.A. DREW EDMONDSON
ATTORNEY GENERAL OF
OKLAHOMA
2300 N. Lincoln Boulevard,
Suite 112
Oklahoma City, OK 73105-
4894
(405) 521-3921

HENRY D. MCMASTER
ATTORNEY GENERAL OF SOUTH
CAROLINA
P. O. Box 11549
Columbia, SC 29211
(803) 734-3970

LAWRENCE E. LONG
ATTORNEY GENERAL
STATE OF SOUTH DAKOTA
500 East Capitol Avenue
Pierre, SD 57501-5070
(605) 773-3215

PAUL G. SUMMERS
ATTORNEY GENERAL OF
TENNESSEE
P.O. Box 20207
Nashville, TN 37202-0207
(615) 741-3491

GREG ABBOTT
ATTORNEY GENERAL OF
TEXAS
P.O. Box 12548
Austin, TX 78711
(512) 936-1700

MARK L. SHURTLEFF
UTAH ATTORNEY GENERAL
OF UTAH
Utah State Capitol Complex
East Office Bldg., Suite 320
Salt Lake City, UT 84114-2320
(801) 538-9600

ROB MCKENNA
ATTORNEY GENERAL OF
WASHINGTON
1125 Washington Street SE
P. O. Box 40100
Olympia, WA 98504-0100
(360) 753-6245

Counsel for Amici Curiae

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* Counsel of Record